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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1594

CEMENT TRANSPORT, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 490 F. 2d 1024. The Board's decision and order (Pet. App. 12a-35a) are reported at 200 NLRB No. 122. Its decision in the related representation proceeding (Pet. App. 36a-46a) is unreported.

JURISDICTION

The decision of the court of appeals was entered on January 22, 1974 (Pet. App. 1a), and a petition for rehearing was denied on March 4, 1974. The petition for a writ of certiorari was filed on April 24, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that Edgar Ray Thompson, an owner-driver under a lease agreement, was an employee of the company and not an independent contractor.

2. Whether substantial evidence supports the Board's finding that Thompson was discharged because of his union activities rather than because of misconduct.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the appendix to the petition, pp. 46a-48a.

STATEMENT

A. The Board's Findings of Fact

1. *The status of the Company's single-owner drivers* [1]

Cement Transport, Inc. ("the Company") transports bulk and sack cement pursuant to a hauling agreement with the Kosmos Portland Cement Company (Pet. App. 17a). It operates as an interstate motor vehicle common carrier under certificates of public convenience and necessity granted by the Interstate Commerce Commission (hereafter "ICC"), and as an intrastate carrier under the authority of the Kentucky Department of Motor Transportation (Pet. App. 38a; A. 63).[2] The Company owns the trailers used in its business, but leases tractors from various individuals—single owner-drivers, multiple owner-drivers, and owner-nondrivers (Pet. App. 38a; A. 65).[3]

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[1] The facts on this issue are derived from the record of a related representation proceeding, which was incorporated in the instant unfair labor practice proceeding (Pet. App. 16a). In the representation proceeding, which was initiated by a petition filed on January 3, 1972, by Local Union No. 89 of the Teamsters, the Board found that the Company's single-owner drivers were employees, not independent contractors, and directed an election to determine whether they desired that union as their representative (Pet. App. 36a-46a). (The definition of "employee" in Section 2(3) of the Act excludes "any individual having the status of an independent contractor.")

[2] "A." references are to the printed appendix to the briefs in the court below.

[3] Single owner-drivers own and drive a single tractor which they lease to the Company. Multiple owner-drivers own more

The Company executes a separate, standard lease covering each tractor regardless of the number of tractors leased from any single individual (Pet. App. 37a; A. 65-67). The lease provides that the tractor shall be operated under the direct supervision and control of the Company and that it "shall be devoted exclusively to the [Company's] business of transportation as much and as often as may be reasonably required by such business" (Pet. App. 38a-39a; A. 237-239). Applicable ICC regulations permit the Company to operate with leased equipment, but require it to be responsible for the "exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto * * *" (Pet. App. 38a; see also, 49 C.F.R. 1057.4(a)(4)). The lease also requires that the tractors meet all federal and state regulations; that drivers' trip logs be maintained and delivered to the Company daily; that the Company's name, ICC certificate, and State Commission sticker be displayed on the tractors; and that each driver not be permitted to drive more than 10 hours per day (Pet. App. 39a-42a; A. 236-241, 75-76, 85-86, 115). Each lease runs for one year and is subject to termination by either party on 30 days' written notice, or immediately "in the event of the breach of any of its provision[s] * * *" (Pet. App. 38a; A. 240). Rental payments made to tractor

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than one tractor which they lease to the Company. They drive one of these tractors, and employ nonowner drivers to drive the remainder. Owner-nondrivers lease tractors to the Company, but do no driving themselves. (Pet. App. 38a.)

owners for hauling cement are unilaterally set by the Company (Pet. App. 41a; A. 124).

The expenses of operating and maintaining the tractor are paid for by its owner (Pet. App. 39a; A. 237-238). The Company, however, provides fueling facilities at its terminal on both a discount and credit basis, pays for cargo and liability insurance, and reimburses drivers on a daily basis for their toll expenses (Pet. App. 39a; A. 79-82, 111). The Company also maintains an optional Blue Cross-Blue Shield Health and Accident plan and an optional investment savings plan for the drivers (Pet. App. 40a; A. 93-94). The Company contributes half the premiums to the former and matches savings up to $25 per month for the latter (*ibid.*).

The Company initiates a safety check of the vehicle before executing a lease (Pet. App. 39a; A. 98). Thereafter, the Company inspects the tractor periodically (Pet. App. 39a; A. 147-148). Each driver is required to file an employment application with the Company. The applicant must meet Company requirements before he is permitted to operate Company vehicles (Pet. App. 39a; A. 108-109).[4] All drivers are required to undergo a physical examination, at Company expense by a physician specified by it, before they commence driving, and to periodic examinations thereafter (Pet. App. 39a; A. 107-108).

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[4] The Company notifies multiple owner-drivers and owner-nondrivers whether the applications of nonowner-drivers for their vehicles have met the Company's requirements (Pet. App. 39; A. 108-109).

Upon signing a list maintained by the Company, drivers are assigned hauls by the Company dispatcher on a first-in, first-out basis (Pet. App. 40a; A. 83). A driver who signs in and refuses to accept a load is subject to a three-day suspension (Pet. App. 40a; A. 115, 140-141). At the time a driver picks up a load the Company provides him with a bill of lading, containing instructions as to the date, time, and place of delivery (Pet. App. 40a; A. 86-87). The lease agreement provides that "notice and information with respect to the pick-up, routing and delivery of the trailer to be pulled by the driver shall be given by the Carrier to the driver in advance of each trip" (Pet. App. 40a; A. 237).

Tractor owners are not required to haul exclusively for the Company and have hauled such products as tobacco and propane gas for other companies during the winter season when the demand for cement is low (Pet. App. 40a; A. 89-90, 147). However, the tractor remains at the disposal of the Company and is subject to recall whenever the Company needs it to meet its transportation demands (Pet. App. 40a; A. 237, 239, 189-190).

Based upon these facts, the Board's Regional Director, in the representation proceeding (n. 1, *supra*), concluded that the Company's single owner-drivers and nonowner-drivers operating leased equipment were employees and not independent contractors (Pet. App. 36a-45a).[5] Applying the common law

[5] The Director found that multiple owner-drivers were "supervisors" within the meaning of Section 2(11) of the

"right of control" test, he acknowledged that "there are concededly some factors that indicate that the owner-drivers are independent contractors and that the nonowner-drivers are employees of independent contractors," but found that these factors were "outweighed by others which establish extensive employer control over the owner-drivers and/or their drivers" (Pet. App. 41a).* The Director emphasized (Pet. 41a-42a):

> the overall effect of the ICC regulations, requiring, as they do, comprehensive employer control over the operations of the tractor owners, the drivers, and the leased equipment; the lease providing for the Employer's use and control of the leased equipment; the fact that the rental payments made to tractor owners for hauling the Employer's freight are unilaterally set by the Employer; the fact that either party may terminate the lease without cause on 30 days written notice, or immediately if one party violates the Agreement; the fact that the tractor owners are required to submit their equipment to a safety check by the Employer; the fact that if a driver "signs in" but refuses to take a load, he is, in effect, disciplined by not being allowed to drive for the Employer for a period of three days; the fact that once a driver "signs in" he is bound

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Act, who are excluded from the definition of "employee" in Section 2(3) (Pet. App. 42a-43a).

* The Regional Director's decision was consistent with a 1967 Board decision involving the same drivers. *Cement Transport, Inc.*, 162 NLRB 1261. The latter decision was contrary to a 1955 decision finding them to be independent contractors. *Cement Transport, Inc.*, 111 NLRB 175.

by the bill of lading furnished him by the Employer as to the date, time and place of delivery; the fact that the drivers are required to submit a driver's log to the Employer; the fact that all owner-drivers and drivers are required to file an application for employment with the Employer; the fact that each driver must undergo a physical examination at the expense of the Employer; the fact that the Employer has instituted a health and accident insurance plan and savings investment program for the owners and drivers; and, finally, the fact that each tractor is required to exhibit the Employer's name and ICC certificate number.

2. *The discharge of single owner-driver Edgar Ray Thompson*

Edgar Ray Thompson was a single owner-driver for the Company for 17 years (Pet. App. 17a; A. 306). In June 1971, Thompson renewed his efforts to organize the Company's drivers by contacting Teamsters International Representative Donald Davis, who was assigned to Local 299 (Pet. App. 18a; A. 306-309, 382-383).[7] Davis gave Thompson a supply of authorization cards, and instructed him to get them signed (Pet. App. 18a; A. 307-309). Thereafter, Thompson began soliciting drivers to sign the

[7] Thompson contacted Davis because he had gone to a representative of Local 89 in 1969 to initiate a new union campaign, and "before we got our cards signed [Company General Manager] Epps told us how many cards we done picked up" (Pet. App. 18a-19a; A. 344-345). As a consequence of Epps' remarks, the 1969 campaign was discontinued (Pet. App. 19a).

cards, and by July 15 had obtained 38 signatures (Pet. App. 19a; A. 306-307, 290-291).[8]

During Thompson's activities, Company General Manager Epps interrogated at least three employees concerning whether Thompson had solicited them to sign authorization cards and whether they had done so (Pet. App. 20a-21a). On July 1, the Company mailed a letter to each driver emphasizing that a union would be "the worst possible thing that could happen to Cement Transport and the men who drive for us." The letter urged the drivers not to sign cards, pointing out the friendly relationship between management and the drivers and the financial benefits being paid them. The letter noted the Company's voluntary establishment of both health and savings plans and the fact that it paid 100 percent of the drivers' tolls (Pet. App. 21a; A. 492-496).

After soliciting the cards, Thompson continued propagandizing for the union. He discussed with the other drivers what he believed to be their inadequate compensation (Pet. App. 21a-22a; A. 348-351). He specifically alluded to an arrangement in his first contract with the Company which paid him 65 percent of the gross revenue derived from each haul, and noted that it had been replaced by the current

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[8] Subsequently, Thompson returned the cards to Davis who, in turn, gave them to International Representative Leon Carrier, who was assigned to Local 89 (Pet. App. 19a; A. 307-309).

zone system (Pet. App. 22a; A. 348-353, 291-292).[9] In mid-October, Thompson went to the offices of the Kentucky State Motor Transport Division and obtained copies of the Company's rates and tariffs. He duplicated these documents and distributed them to the drivers to compare against their own salaries (Pet. App. 22a-23a; A. 357-359, 316-317, 411-412).

On October 25, in response to Thompson's activity and specifically his distribution of Company tariff rates, Company President Cummins wrote Thompson that his lease was terminated (Pet. App. 23a; A. 477-479). The following day, in a telephone conversation between the two men, Cummins informed Thompson that the Company simply could not tolerate him "spreading that union poison around" (Pet. App. 13a, n. 2, 23a; A. 313-314). Cummins added that he was aware of Thompson's activities "in June," and "wondered why he did it," "why didn't [he] come and talk to [Cummins] if [he] had some problems * * * [instead of] going to get somebody else to solve his problems * * *" (Pet. App. 23a-24a; A. 479-481).

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[9] The zone system pays a flat rate for each zone (10 miles) covered by a haul (A. 490-491). Company Bookkeeper and Accountant Harry Ligon testified that the Company had always used a zone system of compensation and had never paid drivers 65 percent of the gross revenue. The Administrative Law Judge found that, regardless of the actual basis on which Thompson was paid when he started to work, Thompson believed that his first lease paid him 65 percent of the gross revenues and that his subsequent actions and discussions were undertaken in accordance with that belief (Pet. App. 22a).

B. The Decisions Below

The Board found that the determination in the representation proceeding (n. 1, *supra*) that the single-owner drivers were employees was conclusive of Thompson's status in this proceeding (Pet. App. 25a-26a). The Board rejected the Company's contention that it discharged Thompson because he defamed the Company by, *inter alia*, falsely accusing it of bribery of a union official.[10] The Board, crediting Thompson's testimony that Cummins told him "he was being let go because of the 'union poison' he was spreading around," added (Pet. App. 13a):

> We would note that Thompson was a capable driver and that he was aggressive in his union activity to achieve benefits he thought he and his fellow employees were entitled to receive. Respondent's unequivocal discharge of him for these activities cannot now be justified on the ground that Thompson's activities may have provided Respondent with another basis for his discharge. The Board's problem in such cases is to determine not whether a good reason existed for the discharge, but whether that was the real reason, and if not, whether the real reason concerned the employee's union activity (or lack thereof). * * *

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[10] Thompson denied making the accusation, and the Administrative Law Judge made no credibility resolutions regarding it (Pet. App. 28a; A. 344-345, 347). The Law Judge did find, however, that Thompson's suspicions concerning collusion between the Company and Local 89 (see n. 7, *supra*) were "unrefuted" on this record (Pet. App. 28a-29a, 13a).

Accordingly, the Board (with Chairman Miller dissenting) held that the discharge of Thompson violated Section 8(a)(1) and (3) of the Act. The Board ordered, *inter alia*, that he be offered reinstatement to his most recent lease agreement and be made whole for loss of income resulting from the Company's discrimination (Pet. App. 34a).[11]

The court of appeals found substantial evidence to support the Board's finding that "Cement Transport has a sufficient right to control its single owner-drivers to sustain a finding that they are employees rather than independent contractors" (Pet. App. 3a-4a). It further found "substantial evidence to support the Board's conclusion that Thompson was discharged because of his union-related activities" (Pet. App. 6a). Finally, the court rejected the contention that Thompson's circulation of the bribe rumor was so outrageous as to justify his discharge in spite of his protected activities. The court agreed with the Board that (Pet. App. 10a):

> * * * Thompson had reason to suspect Company-Local 89 collaboration, since the Company had quickly found out the number of union cards obtained in 1969, when Thompson had tried to organize a unit under Local 89's auspices. Given this circumstance, * * * the rumor about Local 89-Company collusion was not "totally baseless." Whatever the specific allegations may have been

[11] The Board's further finding that the Company coercively interrogated employees concerning their union activities, in violation of Section 8(a)(1) of the Act (Pet. App. 32a), is not contested here.

> about a "bribe," even assuming that Thompson made them, they are among those matters best left to charge and counter-charge, with eventual resolution by the vote at a representative election. * * *

Accordingly, the court (with one judge dissenting) enforced the Board's order (Pet. App. 11a).

ARGUMENT

1. In *National Labor Relations Board* v. *United Insurance Co.*, 390 U.S. 254, 256, this Court held that, in distinguishing between employees and independent contractors for purposes of the Act, "general agency principles" are to be used and "all of the incidents of the [employment] relationship must be assessed and weighed with no one factor being decisive" (*id.* at 258). As shown above, the Board, upheld by the court below, considered the total employment relationship in concluding that the Company's single-owner drivers were employees. Petitioner's contention that the Board erred in its conclusion raises only a factual issue which does not warrant further review.

The Board cases (Pet. 8), which petitioner contends show that "it [was] treated differently, on the same basic facts, from the carriers in the most recent Board cases" (Pet. 12), are factually distinguishable. In each of those cases, the drivers were free to accept or decline loads without penalty according to their own assessment of the economic advantage to them in making a particular run. *Fleet*

Transport Co., Inc., 196 NLRB 436, 437; *Conley Motor Express, Inc.*, 197 NLRB No. 57, sl. op., pp. 5-6, 10, 80 LRRM 1399; *Portage Transfer Co., Inc.*, 204 NLRB No. 117, sl. op., pp. 4-5, 83 LRRM 1398; *Local 814, I.B.T.*, 208 NLRB No. 22, sl. op., pp. 23, 31, 85 LRRM 1518; *George Transfer & Rigging Co., Inc.*, 208 NLRB No. 25, sl. op., p. 6, 85 LRRM 1097. Here, by contrast, the Board and the court below found (Pet. App. 40a, 41a, 3a, n. 3) that the drivers were subject to discipline if they refused the first job they were assigned after checking in.

2. The Board, upheld by the court below, found that Thompson was discharged for "spreading the union poison around," not, as petitioner contends, because of his allegations against the Company. Thus, this record does not present the issue whether the Company would have been privileged to discharge Thompson because of his remarks had it, in fact, been so motivated. As the Board stated, the issue is not "whether a good reason existed for the discharge, but whether that was the real reason * * *" (Pet. App. 13a, n. 2). The resolution of this issue involves only a factual assessment which does not warrant review by this Court.

Similarly, the Board's finding, upheld by the court below, that "Thompson was [not] guilty of misconduct so outrageous as to justify his discharge in spite of his protected activities" (Pet. App. 7a), raises no issue meriting further review. "The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which

must be balanced against the employer's right to maintain order and respect. * * * Initially, the responsibility to draw the line between these conflicting rights rests with the Board, and its determination, unless illogical or arbitrary, ought not be disturbed." *National Labor Relations Board* v. *Thor Power Tool Co.*, 351 F. 2d 584, 587 (C.A. 7). The Board was reasonable in striking the balance in Thompson's favor. For, even assuming Thompson made the bribery allegation attributed to him, it could not be characterized as "baseless" (Pet. App. 10a, 13a, n. 2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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